

No. **82-1714**

Office - Supreme Court, U.S.
F I L E D

APR 11 1983

ALEXANDER L. STEVENS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

Thomas R. Angel and Loretta C. Angel,

Appellants,

vs.

Louis H. Renn, Mildred M. Renn, and
Does I through V, inclusive,

Appellees.

On appeal from the Supreme Court of the
State of California

This appeal is taken pursuant to Section 1257(2)
of Title 28 of the United States Code.

28 U.S.C. §2403(b) may be applicable and shall be
served upon the Attorney General of the State.

Thomas R. Angel
Loretta C. Angel
Appellants pro se
Post Office Box 753
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QUESTION PRESENTED

Whether the inherent ambiguity and unintelligibility of *California Code of Civil Procedure §283(1)* renders its' application repugnant to the *Fourteenth Amendment of the United States Constitution* in that such application violates the individuals' right to contract in settlement of civil litigation.

All parties appear in the caption of the case in the United States Supreme Court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF CASE	4
SUBSTANTIALITY OF FEDERAL QUESTION	8
CONCLUSION	12
APPENDIX	14

TABLE OF AUTHORITIES

Pages

CONSTITUTION

United States Constitution

Fourteenth Amendment i,1,3,4,9&12

STATUTES

California Code of Civil Procedure

§283(1) i,1,3,4,5,6,7,9,10,11&12

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division I, is printed in Appendix "A" hereto and such opinion, as specified in the opinion, is unpublished.

JURISDICTION

The grounds on which the jurisdiction of the Court is invoked are that the inherent ambiguity and unintelligibility of *California Code of Civil Procedure §283(1)* renders its application repugnant to the *Fourteenth Amendment of the United States constitution* in that such application violates the individuals' right to contract in settlement of civil litigation. ... as in the instant case, where the court has ruled that appellants' attorney had the discretion to enter a settlement both unknown to and unauthorized by appellants, eliminating altogether their right to contract in settlement of lawsuit N8598.

The nature of the proceeding below is a lawsuit to set aside judgment N8598 because it was rendered

due to extrinsic fraud. Appellants, Thomas R. Angel and Loretta C. Angel, (hereinafter Angels) and appellees, Louis H. Renn and Mildred M. Renn, (hereinafter Renns) concurrently moved Superior Court for Summary judgment. Renns' motion for Summary judgment was granted and the complaint herein was dismissed and such judgment was entered in judgment book 1349 at page 389 on May 13, 1981.

The judgment appellants' seek to have reviewed is dated January 24, 1983, and was entered on January 24, 1983. A rehearing by the Court of Appeal of the State of California, Fourth Appellate District, Division 1, was denied by order dated January 31, 1983. A hearing in the California Supreme Court was denied by order dated March 23, 1983. The notice of appeal herein was filed on March 29, 1983, in the Court of Appeal, Fourth Appellate District, Division 1.

The jurisdiction of this court is invoked under *Section 1257(2) of Title 28 of the United States Code.*

A copy of the order denying a hearing herein by the California Supreme Court is included herein as APPENDIX "B", and the notice of appeal is included herein as APPENDIX "C".

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the Constitution of the United States, Section 1 in relevant part provides:

"No State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Code of Civil Procedure §283(1)
states:

"An attorney and counselor shall have authority to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise."

STATEMENT OF CASE

The question herein was raised with the Superior Court (clerks transcript, pages 184, 387 & 388), the Court of Appeal (opening brief, pages 21 & 22 & petition for rehearing, pages 7 & 8), and the California Supreme Court (petition for hearing, pages 13, 14 & 15) in relevant part as follows:

"Contract to settlement of a lawsuit is the ultimate contract in that it inherently involves the right to due process of law. The individuals constitutional right to due process must be absolute and not left to the discretion of the attorney. CCP §283(1) needlessly jeopardizes the individuals constitutional right to due process afforded in the *Fourteenth amendment of the Constitution of the United States*. CCP §283(1) is unconstitutional because of the apparent ambiguity involved in the words his agreement. The word his is by definition one person, whereas the word agreement by definition, in accordance with Black's Law Dictionary, inherently and of necessity involves two or more persons and in law those persons are required to be those persons effected by the agreement as to obligation and/or right. Therefore, settlement of any lawsuit must of necessity be between the parties since neither the court, nor the attorney representing a client in litigation are effected therein as to obligation or right."

The Superior Court declined to address the constitutional issue raised as to CCP §283(1). The court of Appeal addresses CCP §283(1) specifically in their opinion at page 5, Section III, stating in relevant part, "Angels argument reads too much into the statute."

Angels specifically alleged in declaration that the settlement of record in N8598 was unknown to and unauthorized by themselves and that such was known by Renns' attorney at the time such settlement was entered into the court record and that Angels have never accepted the settlement of record.

All such allegations are uncontradicted in any opposing declarations. Additionally, Angels' attorney, in correspondence to Angels and such correspondence is properly before the court as evidence, admits that the settlement of record was unknown to and unauthorized by Angels and that such was known by Renns' attorney at the time such settlement was entered into the court record.

Yet, and despite such uncontradicted material

allegations and the evidence thereto, the Court of Appeal, while refusing to address the fact that such material allegations are uncontradicted and the evidence thereto, states in their opinion, APPENDIX "A", at page 3, footnote 1,

"Our reading of the record persuades us the dispute is simply whether Midlam's authorization to settle the case for \$2,000 included discretion to accept a promissory note."

That the Court of Appeal invoked *CCP §283(1)* is not specifically stated, however, the only way in which such uncontradicted allegations and evidence thereto can be determined immaterial is by invoking the attorney discretion permitted under *CCP §283(1)*.

Additionally, Angels alleged in declaration that the settlement of record in N8598 was fraudulently entered. Such allegation is indisputable when comparing the aforementioned correspondence from Angels' attorney and the transcript of trial in N8598. Angels' attorney admitted in correspondence that he was unauthorized as to the settlement of record, yet, ... and 2 days previously, Angels' attorney, for court transcript, informed the Court that he was

authorized as to the settlement of record in direct contradiction to his admission in correspondence.

Further, Angels alleged that their attorney sold out their lawsuit N8598 during trial and prior to the settlement of record. Such allegation is supported by the expert opinion of attorney Lynne Geyser, wherein she states, Angels' attorney undermined their case during trial and prior to the settlement of record.

Lastly, Angels allegations that their lawsuit N8598 is meritorious and that they were cut-off from concluding discovery as to the instant case are uncontradicted in any opposing declarations.

The decision by the Court of Appeal herein can not be justified in any way other than by invoking the attorney discretion permitted under CCP §283(1).

SUBSTANTIALITY OF FEDERAL QUESTION

All civil litigants are potential candidates for settlement. It is of utmost importance that civil litigants' right to contract in settlement be absolute in order to sustain public trust and protect the public interest.

Superior Court stated that approximately 80% of all civil litigation ends in settlement. The Court of Appeal has stated that the validity of 20% of all settlements is questioned by way of appeal. There are an undetermined number of civil litigants who question the validity of settlement, who do not appeal, and an undetermined number who do not litigate because of an increasing awareness of what is happening in settlements.

Signatures of the parties to a contract to settle civil litigation could be made a requirement. Such procedure would insure the rights of civil litigants in settlement. Such procedure would also economize judicial time by ending much of the prolonged litigation required in addressing the

validity of settlements. Five years of needless litigation have been required in the instant case.

CCP §283(1) is repugnant to the *Fourteenth amendment of the United States Constitution* in that it violates the individuals' right to due process of law by violating the individuals' right to contract. CCP §283(1) is quoted as follows:

"An attorney and counselor shall have authority to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise." (Emphasis added)

CCP §283(1), in the minimum, is unconstitutional because of the apparent ambiguity and unintelligibility involved in the words his agreement. The words "his agreement", as used in CCP §283(1) are mutually exclusive words and defy definition therein. The word his is by definition one person, where as the word agreement by definition inherently involves two or more persons.

The word agreement is defined in Black's Law Dictionary, in relevant part, as follows:

"in law, a concord of understanding and intention between two or more parties with respect to the effect upon their relative rights and duties, of certain past or future acts or performances; the consent of two or more persons concurring respecting the transmission of some property, right, or benefits, with the view of contracting an obligation, a mutual obligation, a compact between parties who are thereby subject to the obligation or to whom the contemplated right is thereby secured."

By definition then, in accordance with Black's Law Dictionary, the word agreement inherently and of necessity involves two or more persons and in law those persons are required to be those persons effected by the agreement as to obligation and/or right. Therefore, settlement of any lawsuit must of necessity be between the parties since neither the court, nor the attorney representing a client in litigation are effected therein as to obligation or right.

CCP §283(1) does not speak to, nor provide protection for the individual whose attorney enters an unauthorized settlement into the court record, as in the instant case wherein Angels have been subjected to approximately five years of needless

litigation.

That right which is constitutionally given to the individual can not be abdicated by and at the discretion of the individuals attorney. Contract to settlement of a lawsuit is the ultimate contract in that it inherently involves the right to due process of law. The individuals constitutional right to due process must be absolute and not left to the discretion of the attorney. That which by legal definition is between the parties, contract to settlement of a lawsuit, must remain between the parties.

Judgment N8598 reads that the settlement is a "stipulation of the parties" and again reads that such settlement "is as a matter of compromise only between the parties." Such judgment does not reflect the truth in accordance with the proof. In accordance with the State Courts judgment herein, settlement was entered in judgment N8598 pursuant to CCP §283(1), which permits attorney discretion and can not be determined a stipulation of the parties, nor a compromise only between the parties. Judgment

herein, then, is in direct conflict with judgment N8598.

Put in the most fundamental of terms, CCP §283(1) surrenders the individuals substantial constitutional right to due process to the attorney. Such attorney privilege can not be justified. It does not serve public interest and defeats public trust.

CONCLUSION

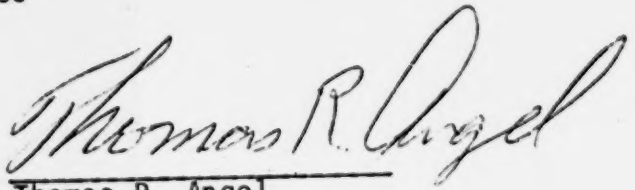
The individuals right to contract is fundamental to due process of law and is provided for in the *Fourteenth amendment of the United States Constitution*.

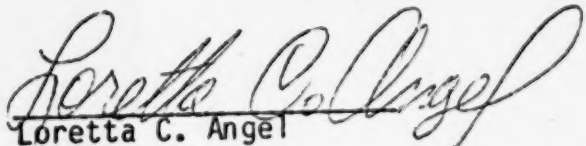
CCP §283(1), as it currently reads, is repugnant to the *Fourteenth amendment of the United States Constitution* in that it surrenders the individuals substantial constitutional right to contract to the attorney. Such attorney privilege can not be justified. It does not serve the public interest and defeats public trust.

Appellants request that their right to contract herein be restored to them and that all future civil litigants' right to contract in settlement be made absolute.

Respectfully submitted,

Dated: April 6, 1983


Thomas R. Angel


Loretta C. Angel

Appellants pro se

APPENDICES

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE

STATE OF CALIFORNIA COURT OF APPEAL - FOURTH DIST.

THOMAS R. ANGEL, et al.,

Plaintiffs and appellants,

v.

Louis H. Renn, et al.,

Defendants and Respondents.

FILED
JAN 24 1983

KEENAN G. CASADY, Clerk

Gondler

DEPUTY CLERK

4 Civ. No. 24901

(Super. Ct. No. N 14705)

Appeal from a judgment of the Superior Court of San Diego County, Anthony C. Joseph, Judge.
Affirmed.

Thomas R. and Loretta C. Angel appeal in pro per from an order of the superior court granting Louis H. and Mildred M. Renn's motion for summary judgment. This is the second time this court has considered the Angels' appeal. (4 Civ. 18610.)

On September 27, 1978, the Angels stipulated to settlement in their suit against the Renns for specific performance of a real estate sale. The court accepted the settlement and judgment was entered. The settlement called for a \$2,000 promissory note with interest due and payable upon the sale of the subject property. The Angels waived their right to appeal. On October 23, 1978, the Angels moved to set aside the judgment under Civil Code section 473 on the grounds they had received erroneous advice from their lawyer. This motion was denied on November 3, 1978. The Angels appealed to this court; the judgment was affirmed. Two petitions for rehearing were denied as was a petition for hearing at the California Supreme Court. Sever-

al writs followed, including a petition for writ of certiorari in the Supreme Court of the United States, denied November 16, 1981. (See Nos. 22866, 18622 and 18129.)

The Angels returned to the lower court and filed the instant action to set aside the judgment for extrinsic fraud. The trial court granted the Renns' motion for summary judgment finding the action was "an attempt to redetermine the conclusion of Judge Froehlich on the motion for nonsuit in the prior case." The court also found there was no triable issue of fact because "[t]he sole basis of plaintiffs' action is inference and supposition." The Angels ask us to review the grant of summary judgment.

DISCUSSION

We are again asked to set aside the stipulated judgment entered September 27, 1978. At the heart of this controversy is the Angels' contention their attorney, Kevin Midlam, was not authorized to accept the proposed settlement. The Angels say they agreed to settle for \$2,000 cash. The next day at trial Midlam accepted a \$2,000 promissory note. The Angels claimed this settlement was outside Midlam's authority and now argue extrinsic fraud. Loretta Angel stated this fraud is based on an "assumption" Midlam's performance at trial was so bad it had to be purposeful; his standard of care so low it was clearly fraudulent. In an ever widening maelstrom of accusation and suspicion of intrigue, the Angels now attempt to assert the only excuse for Midlam's performance is that he was paid off by the Renns.

I

Code of Civil Procedure section 437, subdivision (c), requires each party submit affidavits showing the existence of admissible evidence to support its contentions. Arguments, speculation, and evidence of matters beyond the scope of the pleadings will not be considered. (Keniston v. American Nat. Ins.

Co., 31 Cal.App.3d 803, 812.) Unsupported conclusions and opinions are no substitution for allegations of fact. (Barker v. Wah Low, 19 Cal.App.3d 710, 713; Southern Pacific Co. v. Fish, 166 Cal.App.2d 353, 362.) The trial court's summary judgment in the instant case is based on the failure of the Angels to state any fact in their moving papers and declarations to support their accusation the Renns offered Midlam money in order to lose the lawsuit. The trial court found and our review of the declarations and moving papers support the conclusion there was no showing Midlam's conduct was in any way connected to the Renns.

The trial court asked "What evidence do you have that the Renns had knowledge that Mr. Midlam was deliberately throwing the case, . . . ?" Loretta Angel responded "I make the presumption from the circumstances." The court then asked her to describe what circumstances appearing in the declarations could lead to the conclusion the Renns participated in fraud. The only circumstance Loretta Angel could rely upon was her assertion defendants' counsel knew Midlam was not authorized to settle for a promissory note but only for cash. Even assuming defendants' counsel was not entitled to rely upon Midlam's stipulation entered on the record in open court, there is no inference arising from this action which would lead a rational trier of fact to conclude the defendants paid Midlam to "throw the case." Assuming Midlam exceeded his authority to enter settlement,¹ and fraudulently defeated his clients' interests, the judgment cannot be set aside unless Midlam's conduct was in some way connected to the Renns. (Westinghouse Credit Corp. v. Wolfer, 10 Cal.App.3d 63, 70; Lennefelt v. Cranston, 231 Cal.App.2d 171, 175.)

¹Our reading of the record persuades us the dispute is simply whether Midlam's authorization to settle the case for \$2,000 included discretion to accept a promissory note. This, apparently, is the conclusion reached by the trial court in the instant action:

We conclude the trial court's ruling was correct. Summary judgment is proper unless the supporting papers contain some evidence of fraud or deceit. (Cullincini v. Deming, 53 Cal.App.3d 908, 914; Southern Check Exch. v. County of San Diego, 5 Cal.App.3d 81, 84; McHugh v. Howard, 165 Cal.App.2d 169, 176.)

II

The Angels contend the summary judgment must be set aside because there was inadequate opportunity for discovery. At the hearing on the motion for summary judgment, the Angels requested additional time in which to make discovery. The trial court reluctantly granted this extension and described what was required for a factual showing to defeat the motion. The Angels deposed Louis Renn and all of the various attorneys. The only discovery the Angels were unable to complete was the deposition of Mildred Renn. Mildred Renn stated in her declaration her role in the real estate transaction was insignificant and she agreed to answer written interrogatories. The trial court found on the strength of a declaration by Mildred Renn's doctor her deposition would endanger her health and issued a protective order. Mildred Renn passed away during

"THE COURT: One thing you must remember is there is a distinction, there is a difference between malpractice on the part of your lawyer and extrinsic fraud on the part of your lawyers and the defendants.

"Now the fact that Midlam might have not tried the case to your satisfaction or with the expertise that you think that he should have shown doesn't mean that you have extrinsic fraud. All it means is that you might have a cause of action for malpractice."

And, indeed, the Angels are pursuing such a claim in Thomas R. and Loretta C. Angel v. Kevin W. Midlam, Samuel J. Frazier, and Mark S. Dodge, et al., San Diego Superior Court case No. 459055 filed September 24, 1980.

the pendency of this appeal. We find the moving papers were supported by adequate opportunity for discovery.

III

The Angels' final contention is Code of Civil Procedure section 283 is an unconstitutional grant of authority to counsel because the section "presumes that attorneys are immune to dishonesty and corruption." This argument reads too much into the statute. The statute does not enlarge or abridge the authority of an attorney, it simply prescribes how this authority is exercised. (Preston v. Hill, 50 Cal. 43, 53; City of Fresno v. Baboian, 52 Cal.App.3d 753, 757; Redsted v. Weiss, 71 Cal.App.2d 660, 663.)

IV

The Renns pose this is a proper case for the imposition of sanctions. They argue this appeal coupled with the Angels' litigious history of filings directed to the same legal points is simply harassment.

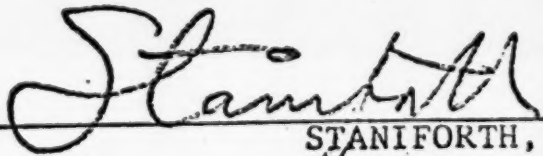
Loretta Angel declared "I gave my word to [my son] that I would not give up and I will not, God as my witness, I will not." And she has not. The issue on this appeal was presented and argued to this court in each of two petitions for rehearing in 4 Civ. 18610. Although the trial court repeatedly questioned the Angels to discover whether there was a single fact or scrap of evidence to support their theory, not a scintilla appeared which has not appeared in the record from the beginning.

The Renns rely on Beckstead v. International Industries, Inc., 127 Cal.App.3d 927. In Beckstead this court held sanctions were proper when the plaintiffs continued to relitigate unsuccessful legal positions because it found the appeal was "motivated solely to harass and annoy." (Id., at p. 930.) The Supreme Court in In re Marraige of Flaherty, 31 Cal.3d 637, 650, described a two-pronged definition to determine when an appeal is frivolous

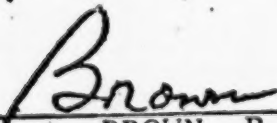
in order to impose sanctions on the appealing party. The first prong, as in Beckstead, is when an appeal is taken for an improper motive representing a time consuming and disruptive use of the judicial process. Secondly, an appeal is frivolous "when it indisputably has no merit --when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]" (Flaherty, at p. 650.)

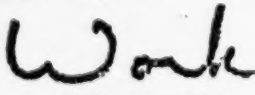
This appeal has been time consuming and disruptive and a reasonable attorney would acknowledge that it is completely without merit. On June 11, 1981 (4 Civ. No. 24824) this court denied the Angels' writ of certiorari and advised them of the court's "power to impose sanctions for successive, frivolous petitions directed to the same legal points." Does the fact the Angels appear in pro per cause a different result? To decline to impose sanctions in this circumstance is to give a pro per on specific notice of the consequences of a frivolous, meritless appeal, an undue advantage over a lawyer represented litigant. The Angels abuse the appellate process and we therefore impose a sanction of \$500.

Judgment affirmed. Angels to pay \$500 forthwith to respondents Renns.


STANIFORTH, J.

WE CONCUR:


BROWN, P.J.


WORK, J.

B-1

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

~~MAR 23 1983~~

I have this day filed Order _____

HEARING DENIED

In re: 4 Civ. No. 24901

ANGEL & ANGEL

vs.

RENN, RENN, ET AL.

Respectfully,

Clerk

37074-877 8-82 AM * OSP

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION 1

THOMAS R. ANGEL, et al.,
Plaintiffs and Appellants

vs.

4th Civil No. 24901

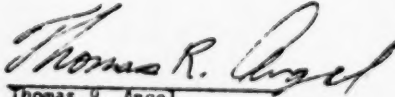
LOUIS H. RENN, et al.,
Defendants and Respondents

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES

NOTICE IS HEREBY GIVEN that Thomas R. Angel and Loretta C. Angel, the plaintiffs and appellants herein, hereby appeal to the Supreme Court of the United States from the final judgment of this Court entered on January 24, 1983, a hearing on which was denied by the California Supreme Court on March 23, 1983.

This appeal is taken pursuant to Section 1257(2) of Title 28 of the United States Code.

Dated: March 29, 1983


Thomas R. Angel
plaintiff & appellant


Loretta C. Angel
plaintiff & appellant